IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-734

KANSAS CITY AREA TRANSPORTATION AUTHORITY,
Petitioner,

v.

DIVISION 1287, AMALGAMATED TRANSIT UNION,
AFL-CIO, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF THE AMERICAN PUBLIC TRANSIT ASSOCIATION

and

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER ON BEHALF OF THE AMERICAN PUBLIC TRANSIT ASSOCIATION

W. STELL HUIE
DAVID E. FOX
KUTAK ROCK & HUIE
1101 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Amicus Curiae

AMERICAN PUBLIC TRANSIT ASSOCIATION
1100-17th Street, N.W.
Washington, D.C. 20036

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The American Public Transit Association (APTA), pursuant to Supreme Court Rule 42, hereby moves for leave to file a brief as *amicus curiae* in support of the petition for writ of certiorari and for reversal of the decision of the United States Court of Appeals for the Eighth Circuit. The motion is necessitated by Respondent's refusal to consent to the filing of the appended brief.[1]

[1] Petitioner has consented pursuant to Supreme Court Rule 42.

APTA is the major national representative of the urban mass transit industry. APTA's members include transit system operators both large and small and public and private, as well as rail, bus and other vehicle operators, manufacturers and suppliers to the industry, state Departments of Transportation and various subdivisions of local public bodies. APTA's more than 250 mass transit system members provide 90% of all mass transit rides in this country.

APTA regularly represents its members' interest in matters before the courts, the United States Congress, the Executive Branch and the federal regulatory agencies. Such representation constitutes a significant aspect of APTA's activities and includes participation as *amicus curiae* in other matters before this Court.[2]

The issues presented in this case concern the interpretation, validity and method of enforcement of very similar labor protection agreement to which almost all APTA members are a party. Such agreements have a direct and immediate impact upon APTA members in that labor costs comprise 75% of a transit system's operating expenses. The decision below suggests the possibility of future federal court review of *any* management decision. As such, it implies major changes in transit labor relations as it expands the scope of the Urban Mass Transportation Act far beyond the intent of the sponsors—who rejected proposed amendments that would have broadened the Act's labor relations impact. This matter is of additional importance to APTA and its members as it is the first time this Court has been asked to construe the Urban Mass Transportation Act of 1964.

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[2] *E.g., New York City Transit Authority* v. *Carl Beazer*, No. 77-1427 (1978).

It is the position of APTA that the Court below, by virtue of its finding that federal subject matter jurisdiction lies for the purpose of interpreting and enforcing labor protection agreements, has created a new federal transit labor law and has gone beyond the statutory mandate by preempting state and local law governing the labor relations between public bodies and public employees, and changed the nature of transit industry labor relations. Moreover, in equating arbitration of new contract terms with grievance arbitration, the opinions below announce a new federal judicial policy favoring *both* forms of arbitration and the substitution of arbitration for collective bargaining as the preferred method of reaching labor agreements. In addition, it is the position of APTA that the Court below erred in rejecting argument that the contract sued upon was an improper delegation of the Transit Authority's state-authorized powers. This far reaching holding is in conflict with APTA members' differing (state transit agency) enabling legislation which often limits the agencies' powers. Thus, the perspective of the Association on these particular issues goes beyond that of the Petitioner.

For these reasons and those stated in the annexed brief, it is respectfully requested that the motion of APTA for leave to file this brief as *amicus curiae* in support of Petitioners be granted.

Respectfully submitted,

W. Stell Huie
David E. Fox
Kutak Rock & Huie
1101 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 785-8010

Attorneys for Amicus Curiae

American Public Transit Association
1100-17th Street, N.W.
Washington, D.C. 20036

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BRIEF AMICUS CURIAE OF THE AMERICAN PUBLIC TRANSIT ASSOCIATION

INTRODUCTORY STATEMENT

The Kansas City Area Transportation Authority ("KCATA") has filed with this Court a petition for a writ of certiorari to consider the validity, interpretation and method of enforcement of a specialized labor agreement between the Authority and the local of the Respondent labor union. This action is one of a series of six such cases brought by Respondent International Union. Two have resulted in decisions by the courts below that suggest that the congressional intent in enacting the Urban Mass Transportation Act was to override state law. This holding is in conflict with the legislative history of the Act, the language of the Act,

and the traditional tenet that it is for each state to determine its own public policy as respects labor management relations for local public employees, and is inconsistent with state procedures for labor relations dispute resolution—state procedures specifically recognized by the Congress when it considered the Transit Act.

The Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601 et seq. (the "Act") authorizes the Secretary of Transportation to provide grants and loans to state and local public bodies for purposes relating to the improvement of mass transportation. Such assistance is contingent upon the applicant public agency satisfying various requirements including the making of arrangements to protect the interests of employees who are affected by such assistance. The Urban Mass Transportation Administration evaluates applications for assistance and when it decides an application is worthy, it forwards a copy to the Department of Labor to certify that satisfactory employee protective arrangements have been made and that Section 13(c) of the Act has been satisfied. The Department refers copies of the grant application to labor organizations representing transit workers within the service area of the applicant transit property.[1]

APTA believes the Department of Labor will grant the required certification only if the parties (the applicant transit system and the union(s) involved) can agree as to terms of protections. APTA members believe that their grant assistance will either be delayed or will never be awarded if the union fails to agree and thus many have consented to what they view as inappropriate union demands.[2]

[1] J. Stern *et al.*, *Labor Relations in Urban Transit* 72, U.S. Dep't. of Transp. Report No. WI-11-0004 (1978), citing speech by L. Yud, Chief, Division of Employee Protections, U.S. Dep't. of Labor, "Employee Protection Requirements in the Urban Mass Transportation Act", *reprinted in Developing Mass Transit Systems*, Proceedings of a Conference cosponsored by the New York Law Journal and the Urban Mass Transportation Administration, 207 (S.A. Payton ed. 1974).

This Act is silent as to how these arrangements are to be enforced. It does not specify any remedy and particularly does not provide a private remedy. Traditional remedies, such as enforcement of the labor arrangements in the courts of the states are not foreclosed and jurisdiction to hear such cases remains in those courts.

The Congressional findings and consequent purposes of the transit assistance program are clearly set forth in the Act, as are a limited number of "labor standards." These standards do not include establishment of a federal transit labor law.

The decision of the Court of Appeals below notes that "the District Courts are divided on the question" of whether the case is one that "arises under" the laws of the United States[3] and admits that "the question is not free from doubt."[4] The Court of Appeals then holds "that a controversy between a public transit agency and a labor union involving a claim of breach

[2] One analyst summarized management's argument in the following way: "[they] . . . charge that the international unions or their locals have limitless power to influence the terms of protection or that they have veto power over grant applications . . ." The analyst proceeds to say that the unions dispute this view. Stern *et al.*, supra at 99.

[3] *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transp. Auth.*, No. 78-1255 at 7 (8th Cir., August 21, 1978).

[4] *Id.* at 11.

of a 13(c) agreement is a controversy that arises under the laws of the United States." [5] By virtue of this holding and contrary to the history of the Act,[6] the Court of Appeals has taken a significant step towards establishing a national transit labor law preempting the laws of the several states governing the labor rights of public employees. And, it may have established new labor law applicable to a myriad of other local public bodies.

In ordering arbitration, pursuant to the labor protective agreement, the Court of Appeals has established new federal law in a second area. It has altered the balance of relations between the state and federal governments by ruling that the KCATA, by reason of its acceptance of federal funds, may not later deny its authority to delegate to a private arbitrator the authority to set wages and benefit terms for public employees.

A further major element in the opinion below is the equating of federal policy favoring grievance arbitration with a purported policy favoring interest arbitration. Such a ruling has wide impact in the context of labor relations and labor law and, although not an issue of concern in the context of this brief *amicus curiae*, it is a matter which suggests a need for review.

The specific issues before this Court, therefore, are whether Section 13(c) of the Urban Mass Transportation Act creates a new federal transit labor law, whether Section 13(c) provides a private remedy, whether the underlying claim for enforcement of an agreement executed in order to comply with Section 13(c) gives rise to a cause of action in the federal courts, and whether acceptance of federal funds prevents a transit entity from denying its authority to delegate (in perpetuity) control of the public purse to a private arbitrator—without standards of control or public accountability.

[5] *Id.* at 11.

[6] Floor manager of the Act, Senator Williams of New Jersey, stated ". . . if the bill shall be enacted, we must have a record that will show that the bill does not preempt state law; it does not control or dominate with irrevocable authority local situations. The bill provides for the encouragement of collective bargaining." 109 *Cong. Rec.* 5417 (1963).

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* of the American Public Transit Association ("APTA")[7] is submitted with a motion for leave to file, timely presented, in accordance with Rule 42 of the Rules of the Supreme Court.

The issues before the Court in this case affect not only the Kansas City Area Transportation Authority ("KCATA"), but the mass transit industry as a whole. The scope of the issues and the impact of the decision on labor relations in mass transit will be immense.

Each year, the more than 250 transit system members of APTA apply for hundreds of Urban Mass Transportation Administration grants and must, as a precondition for receipt of those grants, make arrangements for the preservation of the interest of employees. Such arrangements have, in the 14 years since the UMTA program was initiated, usually included a "13 (c) Agreement," such as that on which Respondent herein relies.

[7] The American Public Transit Association is a not for profit corporation dedicated to representation of the interests and concerns of public transit. Its membership includes more than 250 public and private bus and rail mass transit systems throughout the country. APTA members provide more than 90% of all mass transit rides in the country each year.

The Court of Appeals' ruling, requiring the KCATA to submit to interest arbitration pursuant to the 13(c) agreement jeopardizes the labor relations of each of these transit systems.

The Court of Appeals' ruling also takes from APTA members the ability to establish wages and benefits pursuant to the traditional process of labor-management negotiation. And, because labor costs comprise 75% of their operating budgets,[8] the decision deprives APTA members of the ability to control the management of their resources.

Of APTA's 250 transit system members, more than 200 are "public bodies" and are organized under specific provisions of state law which delineate their authority. They are generally governed by boards of directors, commissioners or the like who are either elected or appointed to guide the transit system. In most cases, the authority of these governing officers is also established by the relevant enabling legislation.[9] Many APTA members share the concern of the KCATA Commissioners that the arbitration ordered by the court enforces a provision of an agreement which was beyond their authority under state law and illegal from its inception.

[8] An estimated 75.6% for 1977 (a figure arrived at by computing the ratio of total industry labor costs ($3,255,720,000 in 1977) to total operating expense ($4,304,800,000 that year)). American Public Transit Assn., Transit Fact Book 21, 35 (1977-78 ed.).

[9] *See, e.g.*, Kan. Stat. Ann. § 12-2534, and Mo. Rev. Stat. § 238.100 and N.Y. Pub. Auth. Law §§ 1331-1353 (McKinney) for the relevant enabling legislation of two APTA members involved in such litigation (KCATA and the Central New York Regional Transportation Authority of Syracuse, New York).

In addition, the excessive interpretation of the statute by the court below would remove jurisdiction from local courts and thrust on already overburdened federal courts an additional major body of potential disputes. Every federal transit grant must be preceded by a 13(c) certification, usually based on a 13(c) agreement. The Department of Labor estimates that it has already made some 3258 13(c) certifications and is presently making some 960 additional 13(c) certifications each year. Thus, the extension of federal jurisdiction will also have great potential impact on our federal court system. Moreover, should the precedent below be affirmed, it may further impact federal courts if other local public bodies are covered by the new jurisdictional reach.

SUMMARY OF PROCEEDINGS

On November 28, 1977, Respondent union filed an action in United States District Court for the Western District of Missouri seeking an injunction ordering arbitration. Judge John W. Oliver, in an unreported opinion, *Division 1287, ATU* v. *Kansas City Area Transportation Authority*, No. 77-0840-CV-W-1 (W.D. Mo. 1978), held that the Transit Authority was obligated to submit to arbitration the making of a new collective bargaining agreement, establishing wages and employment terms.

In reaching this holding, Judge Oliver rejected the Transit Authority's motion to dismiss for lack of subject matter jurisdiction and declined to hold that the matter did not "arise under" the laws of the United States within the meaning of 28 U.S.C. § 1331(a).

Disagreement between the parties as to the relevant facts was limited to differing views as to the negotiat-

ing history and meaning of collective bargaining and "13(c)" agreements.

In reviewing the legislative history of the bi-state compact which established the Transit Authority, Judge Oliver found that the union had proposed that the legislation include a provision authorizing KCATA to offer new contract arbitration in case of impasse in bargaining (Findings of Fact, #18), but such a provision was not included in the statute as enacted. The union was, however, successful in negotiating a 13(c) agreement which Judge Oliver construed as mandating interest arbitration [10] (Findings of Fact, #22-24).

Judge Oliver found that there was no legal certainty that the amount in dispute was not more than $10,000 (Findings of Fact, #61). He also rejected, because of past practice, the Authority's view that "the construction of the 13(c) agreements sought by the union would be beyond the powers granted the Commissioners of KCATA . . . and would be illegal" No. 77-0840-CV-W-1 at 20.

Judge Oliver also offered his summarized version of "controlling federal labor policy" as applicable to § 13(c) agreements *Id.* at 23. In the view of *amicus,* this language is unfortunately excessive in suggesting

[10] Interest arbitration has been defined by the 8th Circuit (No. 78-1255 note 1 at 2) in the instant matter:

> Interest arbitration, which is sometimes called contract arbitration or quasi-legislative arbitration, is the arbitration that may be required when an employer and the collective bargaining agent of employees come to an impasse with respect to the terms and conditions of a new collective bargaining agreement. It differs from grievance arbitration which may be required when disputes arise under an existing collective bargaining agreement.

that there is a Congressionally mandated national federal labor policy for transit.

In affirming the District Court, and by stating that "a breach of a 13(c) agreement is a controversy that arises under the laws of the United States" (No. 78-1255 at 11), the Court of Appeals both found that the federal courts had subject matter jurisdiction and indicated an underlying belief that the Urban Mass Transportation Act established a new federal transit labor law. The Court of Appeals also offered the view that "the obligation to arbitrate is binding on the agency, regardless of state law or policy" No. 78-1255 at 17.

SUMMARY OF RELATED PROCEEDINGS

Absence of Subject Matter Jurisdiction

The instant case is perhaps the culmination of a great deal of "related" litigation. In 1973, the Metropolitan Atlanta Rapid Transit Authority sought enforcement of a "no-strike" clause in the Superior Court of Fulton County, Georgia against a local of this same international union. This union then petitioned for removal alleging federal jurisdiction under 49 U.S.C. § 1601 *et seq.,* and 29 U.S.C. § 185. In regard to the jurisdictional claim under 49 U.S.C. § 1609(c), the same provision herein relied on, United States District Judge Albert J. Henderson, Jr. remanded to state court saying:

> At issue is the union's alleged failure to honor this (arbitration) portion of the agreement. No argument exists with respect to the remaining provisions of the contract, nor is an interpretation of UMTA or any other federal statute involved. This is simply a suit to enforce the terms of a contract.

> There is no diversity of citizenship alleged here and the case does not involve a right or immunity guaranteed by the Constitution or laws of the United States so as to create federal question jurisdiction. *Metropolitan Atlanta Rapid Transit Authority* v. *Division 732, Amalgamated Transit Union,* No. 14892 (N.D. Ga., July 1, 1973).

In *Transit Authority of Louisville & Jefferson County* v. *Amalgamated Transit Union,* No. 76-0535-L(B) (W.D. Ky., July 20, 1977), the Transit Authority similarly filed suit in state court to enforce a provision of a labor agreement (a memorandum committing the parties to the use of good faith in attempting to qualify its employees for the county Employee Retirement System). The union removed to United States District Court pursuant to 28 U.S.C. § 1441(b) and § 1331(a) asserting that the Authority violated the memorandum and demanding arbitration. The Authority sought remand to the state court under 28 U.S.C. § 1441(b) and Judge Rhoades Bratcher, citing *Gully* v. *First National Bank in Meridian,* 299 U.S. 109 (1936), ruled for the Authority stating:

> The heart of this action lies in the body of contract law generated in the Commonwealth of Kentucky. TARC's complaint might implicitly involve elements of the Urban Mass Transportation Act, 49 U.S.C. § 1601 *et seq.,* but these are not sufficient bases for jurisdiction in the forum. The federal law alleged to be involved must be an essential element of plaintiff's case if defendant is to prevail.

These unreported decisions were followed by six instances where Respondent herein, the Amalgamated Transit Union, through its affiliated locals, brought similar actions. The first such case to be decided was brought in United States District Court for the North-

ern District of New York. *Division 580, Amalgamated Transit Union* v. *Central New York Regional Transportation Authority,* No. 77-CV-45 (N.D. N.Y., February 7, 1977). There, the union sought declaratory and injunctive relief to compel the Transit Authority to arbitrate the terms of a new collective bargaining agreement alleging that the action arose under 49 U.S.C. § 1601 (and other federal statutes). Jurisdiction under 28 U.S.C. § 1331 (and other statutes) was asserted. Senior District Judge Edmond Port dismissed for want of federal subject matter jurisdiction. *Id.* at 21-22. Judge Port stated:

> I think that this case does not require construction of the statute. If anything, it requires a construction of the contract that was entered into between the parties and should be relegated to whatever disposition would be made of this dispute under state law. *Id.* at 21.

During the appeal process, the parties executed a collective bargaining agreement and the action was dismissed as moot. *Division 580, Amalgamated Transit Union* v. *Central New York Regional Transportation Authority,* 578 F.2d 29 (2d Cir., June 7, 1978).[11] The brief opinion notes that the case "raises the question of what is the proper forum for determining when

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[11] During the appeal process, the Taylor law proceedings (N.Y. Civ. Serv. Law § 209 (McKinney 1976) continued and resulted in a fact finding award acceptable to both parties and the parties executed a new collective bargaining agreement. Therefore, the appeal was dismissed as moot. *Division 580, Amalgamated Transit Union* v. *Central N.Y. Regional Transp. Auth.,* No. 77-7116 (2d Cir. 1977); *Division 580, Amalgamated Transit Union* v. *Central NY Reg. Transp. Auth.,* No. 77-CV-45 (N.D. N.Y. 1977).

The fact that the state impasse resolution procedures resulted in agreement is indicative of the Congressional wisdom in not subjecting local public bodies to a federal dispute resolution procedure.

§ 13(c) of the Urban Mass Transportation Act of 1964, ["UMTA"] 49 U.S.C. § 1609(c), requires that affected employers and unions agree to compulsory interest arbitration of the terms of a new collective bargaining agreement" (578 F.2d at 30), and notes that the issue is a "thorny one" (*Id.* at 34). But as it was not necessary to the disposition of that cause, the Second Circuit concluded that the case was moot, and therefore neither analyzed nor decided the question.

Another similar 13(c) case was brought by Local Division 1285 of this same union in United States District Court for the Western District of Tennessee, Eastern Division. There, Judge Harry W. Wellford ruled against the union in resounding fashion:

> In summary, plaintiff seeks to enforce, or an interpretation of, asserted contractual rights in this cause; the suit is not basically concerned with validity or construction of a federal statute or the action taken by an administrative officer or agency under provisions of the federal statute.
>
> > 'The fact that a contract is subject to federal regulation does not, in itself, demonstrate that Congress meant all aspects of its performance or non-performance to be governed by federal law rather than by the state law applicable to similar contracts in businesses not under federal regulations.'

Local Division 1285, Amalgamated Transit Union v. *Jackson Transit Authority,* 447 F.Supp. 88, 94 (W.D. Tenn. 1977), citing

> *Ivy Broadcasting Co.* v. *American Tel. & Tel. Co.,* 391 F.2d 486, 490 (2d Cir. 1968). *See also McFaddin Express* v. *Adley Corp.,* 346 F.2d 424 (2d Cir. 1965).

The *Jackson* case is presently on appeal. *Local Division 1285, Amalgamated Transit Union* v. *Jackson Transit Authority,* No. 78-1185 (6th Cir., March 17, 1978).

In Portland, Maine, the local of this same union brought a similar action to compel the transit authority to arbitrate the terms of a new collective bargaining agreement asserting that the action arose under 49 U.S.C. § 1601 (and other federal statutes) and that jurisdiction was proper under 28 U.S.C. § 1331(a).

In *Portland,* Judge Edward T. Gignoux, citing Mr. Justice Cardozo's opinion in *Gully* v. *First National Bank in Meridian,* 299 U.S. 109 (1936) reaffirmed by this Court in *Phillips Petroleum Co.* v. *Texaco, Inc.,* 415 U.S. 125 (1974) as well as by Mishkin, *The Federal Question in the District Courts,* 53 Col. L.Rev. 157, 165 (1953), as instructive with regard to the "arising under" phrase in 28 U.S.C. § 1331, held that there was no subject matter jurisdiction. *Local Division 714, Amalgamated Transit Union* v. *Greater Portland Transit District,* No. 77-54-SD (S.D. Me., January 11, 1978):[12]

> To be sure, § 13(c) undoubtedly was the principal factor leading the parties to enter into the agreement allegedly calling for interest arbitration, but the plaintiff's right to interest arbitration was created by the contract and not by the statute. Section 13(c) does not require arbitration clauses in labor agreements. Indeed, § 13(c) makes no reference to arbitration. The right to arbitrate is a matter of contract and not statutory interpretation, and whatever gloss the Court might place on § 13

[12] The Portland case is presently on appeal, *Local Division 714, Amalgamated Transit Union* v. *Greater Portland Transit District,* No. 78-1077 (1st Cir. February 6, 1978).

> (c) would not alter the relationship of the parties as established in the 1975 § 13(c) Agreement. In short, the contract is the basis of the present action; § 13(c) of UMTA is not. *Id.* at 6-7.

Judge Gignoux noted the unreported cases and the *Division 580* case cited note 11 *supra,* and opined:

> The thrust of the emerging body of case law is in accord with the analysis which this court has just stated—that is, that such controversies do not meet the 'arising under' requirement of 28 U.S.C. § 1331 and § 1337. *Id.* at 7.

In rendering his opinion and in analyzing the "thrust of the emerging body of case law," Judge Gignoux had the benefit of Judge Doyle's (preliminary) contrary view in *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility,* 77-C-202 (W.D. Wis., August 31, 1977). Yet he still felt that "the import of these cases . . . is clear and unambiguous. [Thus] where, as in the present case, the focal point of the litigation is the 13(c) agreement, the action is based in the contract and does not arise under federal law for the purposes of 28 U.S.C. § 1331 and § 1337." *Id.* at 11.

Indeed, in *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility,* 445 F. Supp. 798 (W.D. Wis. 1978), Judge Doyle proceeded to enter judgment sustaining federal jurisdiction. In a lengthy opinion, Judge Doyle correctly asserted that "the core of [the] complaint is [the alleged] right to compel arbitration of the disputed terms of a new collective bargaining agreement." *Id.* at 810. These principles would seem to follow the path laid down in prior litigation and lead to a finding of lack of subject matter jurisdiction.

> A case 'arises under' the Constitution or the laws of the United States when its decision depends upon the interpretation of the Constitution or federal law, (*Cohens* v. *Virginia,* 19 U.S. (6 Wheat) 264, 276 (1821)), that is, when the action may be defeated by one construction of the law and sustained by the opposite construction. *Id.* at 804.

However, through the reasoning enunciated in the labyrinth at 804-09, an opposite conclusion was reached.

In an opinion rendered on October 19, 1978, the Seventh Circuit affirmed. *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility,* No. 77-1981 (7th Cir., October 19, 1978).

Circuit Judge Swygert did support the test used by Judge Doyle for determining federal subject matter jurisdiction (7th Circuit Opinion in *LaCrosse, Id.* at 8). However, that test is not correctly applied. Although ". . . the terms written into a 13(c) agreement are grounded in federal law" (*Id.*), that analysis fails to take the next step. As Judge Gignoux outlines, "to be sure, § 13(c) undoubtedly was the principal factor leading the parties to enter into the agreement allegedly calling for interest arbitration, but the plaintiff's right to interest arbitration was created by the contract and not the statute. Section 13(c) does not require arbitration clauses in labor agreements." (*Portland,* No. 77-54-SD at 6).

Indeed, the statute would not bar a 13(c) agreement that was silent on or even forbade interest arbitration.

Judge Swygert also followed Judge Doyle's footsteps and supported the jurisdictional finding by reference to *International Association of Machinists* v. *Central Air-Airlines,* 372 U.S. 682 (1963). In that case, the parties

entered into an agreement under the Railway Labor Act (45 U.S.C. § 184), a federal statute which expressly establishes boards of adjustment for the purpose of deciding labor disputes. After the board rendered a decision, Central Airlines refused to comply; the union filed suit in federal district court to enforce the board's decision. This court found that the controversy did arise under a federal statute, either 28 U.S.C. § 1331 or 28 U.S.C. § 1337, or both.

As Judge Gignoux pointed out, such reliance on *Central Airlines* is "misplaced." *Portland* decision, at 12. This court found federal subject matter jurisdiction in the *Central Airlines* case based on the scope and history of the Railway Labor Act, 45 U.S.C. §§ 151-184. Under that Act, there was a long-time Congressional concern with minimizing labor unrest in the field of interstate commerce and numerous Congressional attempts to "establish machinery to resolve disputes." The history of Congressional concern with labor issues in mass transit is quite the opposite. Intrastate, even intra-city, commerce is involved. Traditional public employee remedies under state law were involved.

Again, the appropriate summary, in the view of Judge Gignoux was:

> The Railway Labor Act, containing as it does a systematic and comprehensive network of provisions regulating the labor relations between interstate rail and air carriers and their employees, differs radically from UMTA. UMTA exists primarily as a mechanism to provide aid to urban mass transit carriers. *See* § 2(b) of the Act, 49 U.S.C. § 1601(b). The express purpose of the Railway Labor Act, on the other hand, is to promote labor peace and to establish procedures for the efficient settlement of labor disputes. *See* § 2 of the Railway Labor Act, 45 U.S.C. § 151(a). It was to this end that the Railway Labor Act created a National Mediation Board and related dispute resolution mechanism. UMTA, however, contains no similar scheme which so directly and comprehensively permeates the labor relations between the parties. *Portland,* No. 77-54-SD at 13.

The next 13(c) case to go to trial was the instant matter. Without independent consideration, Judge Oliver adopted by reference Judge Doyle's jurisdictional findings as directly relevant to the instant case. Indeed, Judge Oliver's ruling that subject matter jurisdiction was present is quite similar to that of Judge Doyle.

On appeal, Judge Henley, speaking for the court in *Divison 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority,* No. 78-1255 at 7-11 (8th Cir., filed August 21, 1978), relied heavily on Judge Doyle's opinion in affirming, but conceded that the question of "arising under" or federal subject matter jurisdiction is not "free from doubt."

In the sixth 13(c) case, *Division 1160, Amalgamated Transit Union* v. *City of Monroe,* No. 780,587 (W.D. La., May 12, 1978), a trial date has not yet been set.

These eight cases indicate that five District Court judges have found an absence of subject matter jurisdiction [(N.D. Ga.), (W.D. Ky.), (W.D. Tn.), (S.D. Me.), (N.D. N.Y.)] while two have found jurisdiction [(W.D. Mo.), (W.D. Wis.)]. The last, [(W.D. La.)] has yet to speak. Of the three Court of Appeals decisions, two have found jurisdiction [(7th Cir.), (8th Cir.)] while the other [(2nd Cir.)] did not reach the issue. The disparate opinions indicate a serious division of authority which this court should resolve.

QUESTIONS PRESENTED

1. Whether the Congressional intent in enacting the Urban Mass Transportation Act with labor provisions expressly designed not to supersede state law can be interpreted as establishing a federal transit labor law.

2. Whether federal subject matter jurisdiction lies for purposes of validating, interpreting and enforcing a labor agreement between a local public body and a union representing public employees where Congress failed to provide such subject matter jurisdiction and where interpretation of the agreement does not involve interpretation of any federal law.

3. Whether the claim is one upon which relief can be granted even if federal subject matter jurisdicion is found.

4. Whether a federal court should refrain from ordering an agency of the state to violate a statutory duty by delegating its responsibilities to a third person where preemption of state law is contrary to Congressional intent and where the order fails to set standards to guide that person and fails to maintain authority to pass on that decision prior to its effectiveness.

SUMMARY OF ARGUMENT

I. Absence of Federal Subject Matter Jurisdiction

The basis of the action before this Court is the interpretation and enforcement of a contract—a labor agreement. As such, it is properly subject to enforcement in the appropriate state court. Merely because a federal statute mandates the effectuation of arrangements to protect employees, it does not necessarily follow that the enforcement of such arrangements (whether or not reduced to written contract) in the

federal courts is appropriate. In this case, the necessary labor protections mandated by the statute are in place, the protections are quite incidental to the statutory purpose and program, and there is no federal interest in policing the arrangements.

II. The Congress Did Not Intend to Establish a National Transit Labor Law

The labor protections in the Transit Act were enacted for a definite but limited purpose—to protect employees from a worsening of their condition as a result of the federal assistance. Respondent herein did not institute this action because of harm resulting from the federal project.

If the federal courts determine that there is federal jurisdiction to review both the labor protection agreement and also (by Respondent's bootstrapping) the making or maintaining of collective bargaining agreements, then in effect, the federal courts would be reviewing all aspects of transit labor relations.

Had the Congress wanted to place the federal courts in a position of supervising transit labor relations, it could have done so. It provided such authority in other labor relations acts. But the legislative history of the Transit Act gives no support for any such overview. To the contrary, significant portions of that history indicate a very limited Congressional intent in enacting 49 U.S.C. § 1609(c).

III. The Protective Agreement Was Itself *Ultra Vires* and Enforcement Would Constitute Inappropriate Federal Interference With the Authority of the State to Establish Parameters for Its Subdivisions

The Kansas City Area Transit Authority is a bi-state agency, duly established by the Missouri and Kan-

sas legislatures with the approval of the United States Congress. The enabling legislation sets forth the specific powers of the agency. Those powers do not include the ability to delegate to a private arbitrator the power to spend public funds by establishing employee salary and fringe benefit packages. Such power was requested by the union but abandoned during the legislative process as "politically infeasible." If the Authority erred in agreeing to such delegation, it is appropriate to leave enforcement or rejection of the terms of that agreement to the state court.

ABSENCE OF FEDERAL SUBJECT MATTER JURISDICTION

The Court Below Has Decided Substantial Questions in a Manner Inconsistent With Decisions of This Court and Other Federal Courts

The purposes of the Urban Mass Transportation Act and the Congress' view of the national interest are set forth in the Act itself at 49 U.S.C. § 1601(b)[13] and § 1602(a)(2).[14] These purposes relate to the following:

[13] 49 U.S.C. § 1601(b):

(b) The purposes of this chapter are—

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of area-wide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

[14] 49 U.S.C. § 1602(a)(2):

(2) It is declared to be in the national interest to encourage and promote the development of transportation systems, embracing various modes of transport in a manner that will serve the States and local communities efficiently and effectively. . . .

development of mass transportation, facilities, and equipment; the encouragement of, the planning and establishing of area-wide transportation system(s); financing assistance; etc. Thus, the goals, generally speaking, are to aid localities in the provision of mass transit service.

In order to secure funding available under the Act, localities must undertake and complete a number of preliminary steps including certain transportation planning, relocation assistance to displaced persons, compliance with federal civil rights and environmental protection laws, preparation of certain reports and financial audits, provision for low fares to elderly and handicapped persons, and arrangements to meet the labor standards under which the Respondent brought this action.

The Congressional concern was clearly to provide for better mass transit. Nowhere in the statute or legislative history is there evidence that the Congressional purpose was to pass a transit law for the benefit of employees. The labor protection aspects of the legislation are at most, secondary or incidental. Rather, the protections were afforded to employees who might somehow be harmed as a result of the federal assistance.

Respondent has asserted jurisdiction under 28 U.S.C. § 1331(a)[15] based on a federal law—the Urban Mass

[15] "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity." 28 U.S.C. § 1331(a) (October 21, 1976).

Transportation Act of 1964. 49 U.S.C. § 1601 *et seq.* That statute does not, however, by its terms or implication, provide any remedy for violation of contracts between an employer and a labor organization.

In parallel litigation, Respondent union has argued that the Transit Act benefits "discrete interests" as well as providing funds for the general social interest of bettering mass transit. Such a contention is not supported by the statutory language. Section 13(c) was intended as a shield to protect employees from harm arising as a result of the federally assisted project, not as a sword—to benefit discrete interests.[16]

The standards for determining whether a private remedy is implied in a statute, standards which were not considered by the court below, are carefully described in *Cort* v. *Ash,* 422 U.S. 66, 78 (1975):

> First, is the plaintiff one of the class for whose *especial* benefit the statute was enacted . . . that is, does the statute create a federal right in favor of the Plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff? . . . And, finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

[16] The Congressional purpose was to improve public transportation, *supra* p. 20-21, the secondary concern was only to protect existing employee rights, "the rights and privileges which have been already established and preserving their *status quo*" [1964] *U.S. Code Cong. and Ad. News* 2584.

Similarly, in the analogous Second Circuit case, that court held that the legislative history of the Act makes it:

> . . . reasonably clear that Section 13(c) was intended to preserve the rights of employees under existing collective bargaining agreements and to maintain the *status quo* with respect to the employer's obligation to bargain collectively, not to create any new rights for the employees or enhance existing ones. 88 Cong. Rec. 5670-5677 (1963). Division 580, *Amalgamated Transit Union* v. *Central N. Y. Regional Transp. Auth.*, 556 F.2d 659, 662 (2d Cir. 1977).

The first of the criteria set forth in *Cort* is whether the plaintiff is one of the class for whose *especial* benefit the statute was enacted. As in *Cort,* where Justice Brennan took the broad view and looked at the overall purposes of the Act rather than the secondary concern of stockholders, here we know the overall purposes of the Transit Act, for they are set forth with unmistakable clarity in 49 U.S.C. § 1601(b)(3). This is confirmed by the legislative history of the transit Act, for it gives no indication that the Act was intended for the *especial* benefit of employees. The fact that employees were afforded protection from harm arising as a result of the Act hardly suggests that the "primary Congressional goal" (*Cort,* 422 U.S. at 84) was to benefit employees.

In a similar 13(c) case, *Local Division No. 714, ATU* v. *Greater Portland Transit District,* No. 77-54-SD (S.D. Me. 1978), Respondent's sister local union argued that the "especial benefit" test should be narrowly applied. But to accept that proposal would be to read the labor protective provision separately and would be at odds with the statutory language that arrangements be made "to protect the interest of employees *affected by* the federal assistance." (emphasis added.)

Cort further instructs us that for a federal cause of action to be found, there must be evidence of legislative

intent to create the remedy. Neither the language of the statute nor its legislative history indicates such intent.

The third prong of the *Cort* test is whether an implied remedy is consistent with the underlying purpose of the legislative scheme. In contrast to the "scheme" of the Railway Labor Act, 45 U.S.C. § 184 (see p. 26 *infra*), the "scheme" of the transit statute hardly takes organized labor into account. Rather, once it is determined by the Secretary of Labor that employees are protected, the project moves forward. Should employees be harmed, their remedy to enforce the 13(c) agreements in state court is available.[17] And, their alleged claims would rise or fall based on the state court's interpretations of these agreements, for there is no Federal statutory "scheme" relating to transit employees.

The final lesson of *Cort* is that if the "cause of action is one traditionally relegated to state law, in an area basically the concern of the States," it is appropriate to leave the Respondent to its state law remedy. In *Cort*, Justice Brennan noted that state law normally governs the internal affairs of a corporation. The analogy is here exact, for state law normally governs labor relations matters pertaining to public employees.

Since there is no express statutory provision authorizing private actions, the wording of the Act militates against implication of private remedies in that it makes labor protections only a condition precedent to obtain-

[17] *See Local Division 1285, Amalgamated Transit Union* v. *Jackson Transit Auth.*, 447 F.Supp. 88, 94-95 (W.D. Tenn. 1977), and *Transit Auth. of Louisville and Jefferson Counties* v. *Amalgamated Transit Union*, No. C-76-0535-L(B) at 2 (W.D. Ky., April 20, 1977).

ing benefits. Nowhere does the Act declare any conduct unlawful. The gap between the statutory language and the remedy that Respondent deems implied is substantial. Section 1609(c) does not declare violation of a 13(c) agreement to be unlawful and does not set forth the basic scheme for enforcement of a private remedy.

In parallel litigation, the Respondent union has taken the position that federal court decisions dealing with the labor protection provisions in the railroad industry are analogous to disputes concerning the interpretation of transit labor protections. That argument leads to the wrong path. Although 49 U.S.C. § 1609(c) does state that the benefits provided shall be no less than those established under Section § 5(2)(f) of the Interstate Commerce Act (49 U.S.C. § 5(2)(f)), that mandate concerns only the benefit level to be afforded and does not imply applicability of the labor protective "scheme" included in the railroad legislation. Moreover, the labor protections under § 5(2)(f) are incorporated in an order of the Interstate Commerce Commission (ICC), and thus, enforcement of the labor protections would be based on enforcement of an ICC order.[18]

[18] 49 U.S.C. § 5(2)(f) reads:

> (f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its *order* of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order,

The Congress expressly granted the federal courts jurisdiction to review such ICC orders in 49 U.S.C. § 9 and § 16(12) and 28 U.S.C. § 1336.

No comparable grant of jurisdiction can be found in the Transit Act, thus the statutes are not analogous.

These analogies to employee protective provisions and case law related to that industry (and the airline industry) were easily disposed of by Judge Gignoux in the *Portland case,* No. 77-54-SD at 16-17. Not only are there differences in the scope and background of the federal acts, but the industries are different. The Railway Labor Act, 45 U.S.C. §§ 151-184 established a complete scheme to resolve labor disputes. Long time Congressional concern over labor unrest in interstate commerce in certain other industries led to the establishment of machinery to resolve disputes through final and binding decisions. Thus, the labor relations approach was a specific portion of the legislation. Included within the ambit of the statute were boards of adjustment which were "concerned" with both major disputes (those related to wages, hours and working conditions), and minor disputes (those concerned with the interpretation and application of existing contracts). Thus, the Railway Labor Act established a systematic and comprehensive network of provisions regulating labor relations between interstate rail and air carriers and their employees—a scope of labor rela-

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than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees. (emphasis added.)

tions regulation totally absent in 49 U.S.C. § 1601 *et seq. See Portland,* No. 77-54-SD at 17. Thus, Judge Gignoux gave little credence to Respondent union's argument that the *Machinists* case, 372 U.S. 682, interpreting § 204 of the Railway Labor Act, supported a jurisdictional finding under the Transit Act. *Portland* No. 77-54-SD at 16.

The purposes of the Acts are different—the goal of the Railway Labor Act includes the promotion of labor peace and the establishment of procedures for the efficient settlement of labor disputes, the Urban Mass Transportation Act has no similar purpose, and as outlined, is concerned with providing transit aid and mentions labor only in regard to assuring that specific federal grants not themselves cause harm to employees. *See* p. 31 *infra.*

Similarly, § 405 of the Rail Passenger Service Act of 1970, (which concerned Amtrak) 45 U.S.C. § 565, requires rail carriers that contract with Amtrak to provide employee protections. That Act also has a specific grant of federal jurisdiction in § 307 (45 U.S.C. § 547). Thus, cases cited by Respondent union in prior litigation such as *Arthur* v. *Cincinnati Union Terminal,* No. 8968 (S.D. Ohio, December 29, 1976) (motion to reconsider denied, March 15, 1977), are totally inappropriate. As Judge Gignoux noted, while § 307 is an express grant of jurisdiction ". . . tellingly, there is no such specific grant of jurisdiction to the federal courts contained in UMTA." (*Portland,* No. 77-54-SD at 14-15).

We know that the Congress saw fit to vest jurisdiction in the federal courts for these railroad employees. We know also that the Congress, although it patterned the protections after railroad experience, did not choose

to vest the federal courts with jurisdiction over disputes arising under the Transit Act. This omission is not discussed in the legislative history of the UMTA Act; however, it can be inferred that if the railroad acts were copied for one purpose, that their non-use as a model for a second purpose was deliberate. Perhaps the rationale was the fact that since transit employees are public employees, a mandate of control over the work force would be an encroachment on state sovereignty. *See National League of Cities* v. *Usery,* 426 U.S. 833 (1976). The Congress was willing to require that the Act protect employees from harm arising as a result of the project, but not to go any further.

Under the rationale of *National League of Cities* v. *Usery,* the enforcement of labor contracts should be left to the courts of the 50 states so as to avoid displacement of "the states' abilities to structure employer-employee relationships." *Id.* at 851. Such principles should be particularly applicable to situations such as that before us where federal action would interfere with the relationship of local government to its own employees. And an alternate approach should not be lightly considered as ". . . it is not to be supposed that Congress, in exercising its regulatory authority, intends to shift from the state to the federal courts large bodies of private litigation absent some reasonably reliable evidence that this was its intention." 1 *Moore's Federal Practice* ¶ 0.62 [2.2] (2d ed. 1978).

Reduced to its essentials, the complaint concerns a dispute revolving around the terms of a contract. Plaintiff cannot plead a breach of contract and attempt to invoke federal jurisdiction by a transparent technical exercise in pleading. *See Gully,* 299 U.S. 109.

In *Gully,* a Mississippi official brought suit to collect taxes authorized by an Act of Congress. The taxes were owed by an insolvent bank that defendant had acquired. Mr. Justice Cardozo pointed out that neither side in the litigation questioned the Act of Congress or its applicability. But rather, that the dispute concerned whether the defendant was liable under the contract of acquisition and thus, the matter should be left to the Mississippi state courts. The case before us is perfectly analogous. We do not question the fact that 13(c) arrangements are required by federal law.[19] We question, however, whether the *enforcement* of those arrangements is proper in federal court. See p. 12 *supra.*

The aspect of the agreement which this action seeks to enforce (arbitration) is not mandated by federal statute or order. When the parties negotiate a "13(c) agreement," the Department of Labor's obligation is limited to determining whether or not it can certify that employees have been protected. Thus they either approve, disapprove or suspend action on certification. Given the rule that mere approval by a federal agency is not decisive (*McFadden Express, Inc.* v. *Adley Corp.,* 346 F.2d 424, 426 (2d Cir. 1965), *cert. denied,* 381 U.S. 915 (1966)), federal question jurisdiction does not exist because the agency has simply authorized or approved an agreement made between others.

The federal statute, 49 U.S.C. § 1609(c), does not require arbitration. Indeed, despite the request of or-

[19] It should be noted that nowhere does the Act require a 13(c) agreement. It requires only arrangements (to protect employees). The federal responsibility then, effected through the Department of Labor, is only to determine whether the arrangements are in place.

ganized labor, the Congress explicitly rejected inclusion of mandatory arbitration.[20]

The *McFadden* rule sets up a barrier to accepting jurisdiction as the Department of Labor merely certifies an agreement between the parties. Neither that agency nor any statute mandates that compulsory arbitration provisions be included in any agreement or that public bodies operating transit service be required by law to surrender the authority to establish wages of public employees under their jurisdiction.

THE CONGRESS DID NOT INTEND TO ESTABLISH THE NATIONAL TRANSIT LABOR LAW CREATED BY THE COURT BELOW

Following World War II, the urban mass transit industry suffered a decline in ridership that was exacerbated by a concomitant reluctance of the transit enter-

[20] Prior to the enactment of the Urban Mass Transportation Act, representatives of the AFL-CIO and this union as a "constituent member" of the AFL-CIO sought inclusion of a mandatory arbitration provision for the resolution of disputes between local unions and local transit entities. However, the suggested provision was not included and then Secretary of Labor, Willard Wirtz, specifically testified that the proposed legislation would not be a step toward compulsory arbitration.

Hearings entitled Urban Mass Transportation Act of 1963 on S. 6 and S. 917, before a Subcommittee of the Committee on Banking and Currency, United States Senate, 88th Congress, 1st Session 308, 365; Hearings entitled Urban Mass Transportation Act of 1963 on H.R. 3881, Before the Committee on Banking and Currency, House of Representatives, 88th Congress, 1st Session 480-81, 495. *See also* hearings entitled Urban Mass Transportation Act of 1962 on H.R. 11158, before Subcommittee No. 3, Committee on Banking and Currency, House of Representatives, 87th Congress, Second Session (1962), 423-24.

Even an advocate of the labor protective provision, Senator Morse, made it clear that although "organized labor wanted more than the Morse amendment . . . [all they would secure is that] . . . if you have collective bargaining now, . . . [it will be continued]." 109 Cong. Rec. 5672 (1963).

prises to purchase new equipment or otherwise invest in maintenance, management training, marketing, etc. As a result, the Congress found that there was a need to help provide for "the satisfactory movement of people and goods" and that "Federal financial assistance for the development of efficient and coordinated mass transportation systems [was] essential to the solution of these problems." 49 U.S.C. § 1601(a)(2)(3).

The purposes of the Act were very specifically enumerated in 49 U.S.C. § 1601(b)(1)-(3); and, a reading of the entire Act does not reveal the creation of a body of national transit labor law or control by mandatory interest arbitration of the resolution of labor disputes between public transit operators and their employees.

Only § 13 of the Act (49 U.S.C. § 1609) addresses labor relations, and that section provides only for payment of prevailing wages (for certain work) and for the labor protections described in subsection (c). Moreover, the Act does not supplement the labor protections with a grant of jurisdiction to the federal courts to enforce the enumerated protections.

Since its passage in 1964, the Urban Mass Transportation Act has been amended several times, and at no time has Congress altered the management-employee relationship by enacting a national transit labor law. Nevertheless, the decision below could achieve that result for, if the interpretation of complex labor protective agreements is a matter for federal courts to review (and since virtually all transit systems accept federal aid), all transit systems will undertake labor protective agreements which would then be enforceable by the fed-

eral courts.[21] The flurry of 13(c) litigation indicates the impact of this decision. The federal courts would, under the rationale below, hear many transit labor cases which cumulatively could both affect the court system and undermine the intent of the Transit Act by diverting energy and resources to individuals not entitled to transit benefits.

Not only is that prospect antagonistic to the statutory language, but it flies in the face of the legislative history. In Congressional hearings in 1963, Senator Morse stated that the labor provisions would not supersede state law and that state law would control the outcome of disputes arising between employees and grant recipients. 109 *Cong. Rec.* 5347-48, 5359 (1963). This same view was offered by Senator Tower, 109 *Cong. Rec.* 5350 (1963), Senator Williams, 109 *Cong. Rec.* 5417, 5421 (1963), and was confirmed by Secretary of Labor Wirtz, *Senate Hearings, supra* note 20, at 312-13 (1963).

In the Congressional colloquy, the intent to preserve the balance between federal and state concerns is clear. Where as here, the employees in question are employees of local public bodies, the rule must be that "Congress may not exercise that power so as to force directly upon the states those choices as to how essential decisions regarding the conduct of intergovernmental functions are to be made." *National League of Cities* v. *Usery,* 426 U.S. at 855. In that same opinion this Court said: "One undoubted attribute of state sov-

[21] "This court is persuaded that Congress is the appropriate body to determine clearly whether it is national policy for federal courts to become involved in local labor disputes which happen to be within an urban transit area. Congress has not indicated such a policy in UMTA." *Jackson,* 447 F.Supp. at 93.

ereignty . . . is the states' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions . . ." *Id.* Thus, although the Congress enacted the Transit Act prior to the *National League of Cities* case, it anticipated the Court's view that it should not interfere with "the states' abilities to structure employer-employee relationships" or of "the states' freedom to structure integral operations in areas of traditional governmental functions." *Id.* at 851.

Despite the fact that federal policy is in favor of arbitration as a grievance dispute resolution mechanism (*Division 1287,* No. 78-1255 at 16), the conclusion does not necessarily follow that since "that policy would be particularly applicable in the vital area of urban mass transit where strikes of workers are in the highest degree undesirable from the standpoint of the public" (*Id.*), the policy is properly enforceable in the federal courts. The Eighth Circuit erroneously concluded that the "obligation to arbitrate is binding on the agency, regardless of general state law or policy" *Id.* at 17. Congress not only did not occupy the field or preempt state power in 49 U.S.C. § 1601 *et seq.,* but as has been stated above, specifically chose not to do so despite the entreaties of organized labor and repeated chances to do so as the Transit Act was amended. See p. 32 *supra.* Rather, the Act is quite consonant with its history that "specific conditions for worker protection will normally be the product of local bargaining and negotiation." [1964] *U.S. Code Cong. and Ad News* 2584-85.

Unlike the broad preemptions of state law effectuated by federal statutes such as the National Labor Relations Act, 29 U.S.C. § 151; the Labor-Management

Relations Act, 29 U.S.C. § 141; and the Railway Labor Act, 45 U.S.C. § 151, the Transit Act fails to take jurisdiction of publicly owned transit labor relations disputes from the state courts, and it remains fully compatible with state impasse resolution procedures—procedures which worked in the parallel *Division 580* case and resulted in the Second Circuit opinion dismissing the 13(c) action as moot.

Had Congress intended to allow actions "for violation of contracts between an employee and a labor organization . . . [to] be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties," 29 U.S.C. § 185, it could have done so by repeating the language of that Act (the National Labor Relations Act) in the Transit Act. It did not. This court should not lightly consider varying the principle that it is the function of a state to determine the legal consequences which should attach to a contract of employment made by local governmental units. Inference that a federal transit labor law was created by the Urban Mass Transportation Act is unsound.

It is submitted that state court review and enforcement of these labor agreements will not interfere with the purposes of the Act or intrude into an area of primary federal concern.

CONTRARY TO CONGRESSIONAL INTENT AND CONTRACT PROVISIONS PROVIDING THAT LOCAL LAW SHALL CONTROL, THE FEDERAL COURT BELOW HAS FOISTED ON LOCAL GOVERNMENTS A REQUIREMENT THAT THEY NOT CONTEST POSSIBLE VIOLATION OF THEIR STATUTORY AUTHORITY

As local governments have assumed greater responsibilities to provide for citizen needs, there has been a significant increase in the number of local public sector employees.[22] Similarly, as private transit operators encountered financial difficulties, most transit operations came to be operated by public entities.[23] Some consented to interest arbitration in their 13(c) agreements, others did not. Many who accepted interest arbitration provisions did so because they were advised that other transit systems had so agreed or because they believed their grant application would not be acted on until they agreed. (*See* note 2 *supra* at 3).

The evolution of 13(c) agreements is described in several Department of Transportation and Depart-

[22] The number of state and local government employees as a percentage of the total U.S. work force has increased from 6.16% in 1952 to 12.76% in 1975. McGrath, *Public Employment in the United States: A Compilation of Statistical Trends* 18, Congressional Research Service Pub. No. 77-154G, Library of Congress.

[23] In 1950, there were 1380 private transit companies, in 1975 there were 614. Comptroller General of the United States, *Private Companies Should Receive More Consideration in Federal Mass Transit Programs* Rept. No. B-169491 (December 10, 1976). *See also* G. Hilton, *Federal Transit Subsidies* 52-53, American Enterprise Inst. Publication (1974), who states at 53, "In general, conversion of city transit to public ownership was . . . a desperation measure to perpetuate a system which could no longer be operated privately." Hilton further concluded that "the conclusion [is] that conversion to public ownership increases wage rates." *Id.* at 55.

ment of Labor studies.[24] In the early years of the Federal transit program, grants were issued upon management's warranty that employees would not be harmed, but that if harm did occur, management would make them whole.[25] A second stage (1965-1968) was the coordinated negotiation of agreements, some three pages in length, which basically reiterated the five protections in 49 U.S.C. § 1609(c).[26] The next evolution in benefit level occurred in 1971, when Secretary of Labor Hodgson mandated the Amtrak labor protective provisions for certain railroad projects. The transit unions interpreted the agreement as the level of benefits under § 5(2)(f) of the Interstate Commerce Act and refused to sign transit 13(c) agreements unless they contained benefits of a similar nature.[27] Each agreement signed by a transit system was offered by organized labor to the next transit system as reflecting that which they had to sign.[28] The transit systems had no choice and the

[24] J. Stern *et al.*, *Labor Relations in Urban Transit*, ch. IV, U.S. Dep't. of Trans.; Rept. No. I WI-11-0004 (1978); Dep't. of Labor, *The Economic Cost Impact of the Labor Protection Provision of Section 13(c) of the Urban Mass Transportation Act of 1964*, 27-30 (1978).

[25] *Id.* at 27. And *see* 1965 Cleveland Transit System-Amalgamated Transit Union 13(c) agreement.

[26] *Id.* at 27-30 and Stern, *et al.*, *supra*.

[27] *Id.* at 29. And *see* R. Leib, *A Review of the Federal Role in Transportation Labor Protection*, 45 ICC Practitioners Journal 333, 336, 339 (1978).

[28] The process of obtaining DOL 13(c) certification itself leads to a uniformity in protective provisions. The guidelines employed by the Department of Labor for processing 13(c) certification applications and the referral procedure described in the introduction thereto provide that the DOL will refer applications to the International Union that represents the affected employees, 43 *Fed. Reg.* 13,558 at 13,560 (1977), to be codified in 29 C.F.R. § 215.3(b).

In addition, the Constitution and General Laws of the Amalgamated Transit Union (Respondent herein), as amended, 9/26-9/30/77, provide in § 31.2 at 104 that:

> "When Local Unions are seeking written agreements with the Company or with an applicant for Federal assistance under the provisions of §§ 3(e) or 13(c) of the Urban Mass Transportation Act of 1964, said agreements shall be submitted to the I.P. [International President] or his authorized deputy for approval before taking final action."

hundreds of existing "independent" agreements bore a striking resemblance.[29]

Each transit system should have analyzed the arbitration provision for, in many cases, it may be found to be beyond the system's authority. Agencies which themselves had authority to make expenditures of public funds may have lacked the authority to delegate that ability. Indeed, that was the case with respect to the KCATA. The KCATA is a public body, created by bi-state compact, enacted by the Missouri and Kansas legislatures and approved by the United States Congress.[30] That compact does not give the commissioners of the KCATA authority to turn over to a private party (such as an arbitrator) all authority (conceivably in perpetuity) to establish wages and terms of employment for public employees under their jurisdiction. Given the fact that 75% of the KCATA budget is earmarked for salaries and benefits, relinquishing control over that portion of the budget should not be lightly implied.[31] Nowhere in the District Court or Court of

[29] See note 27 *supra*.

[30] P.L. 90-395, 82 Stat. 338.

[31] Neither is it possible to imply such a power into this bi-state compact. Grants of power "must be indicated by express terms or by clear implication." *Jackson* v. *Tahoe Regional Planning Agency*, 566 F.2d 1353, 1358 (9th Cir. 1977).

Appeals opinions is there reference to any authority which would authorize the Commissioners to enter into the alleged agreement. Indeed, the statutes reflect no such authority despite the fact that the legislative history clearly indicates that the Union wanted statutory authority for arbitration of new labor contracts, but abandoned the proposal when advised that it would not be feasible to obtain enactment of such legislation.[32]

Missouri and Kansas law will not lightly permit bodies to contract away or delegate their statutory duties and responsibilities; and the rule of construction of statutory grants of power is generally stated with realistic caution. *Landau v. City of Leawood,* 214 Kan. 104, 519 P.2d 676 (1974); *Carp* v. *Board of County Commissioners,* 190 Kan. 177, 373 P.2d 153, 155 (1962); *Anderson* v. *City of Olivetts,* 518 S.W.2d 34 (Mo. 1975); *State ex. rel. Cities* v. *West,* 509 S.W.2d 482 (Mo. App. 1974); *Clay* v. *City of St. Louis,* 495 S.W.2d 672 (Mo. App. 1973) (unlawful delegation to a public commission of authority to set fees for airport use).

The obligations of the KCATA commissioners are clearly described in the enabling legislation. They include the power to "fix" salaries and wages of (KCATA's) officers and employees.[33] The 1967 amendments to the statutes specifically allowed collective bargaining with unions "concerning wages, salaries, hours,

[32] *See* District Court Finding of Fact #18 concerning a proposed Amalgamated Transit Union March 16, 1976 letter of ATU general counsel, Earle W. Putnam, to William Icenogle, Esq., counsel to the transit system and Lewis Copple, President of ATU Local 1287, requesting that the pending bi-state legislation include among other things, a binding arbitration provision.

[33] Kan. Stat. Ann. § 12-2534 Mo. Rev. Stat. § 238.010.

working conditions, pension or retirement provisions, and insurance benefits," and also authorized written contracts specifying agreed terms of employment.[34] But these provisions fail to authorize arbitration of new contracts and fail to authorize the Commissioners to delegate the authority to establish terms of employment. The scope of the Commissioners' authority is thus explicit.

The Missouri Supreme Court has faced the issue and has determined that only "advisory" assistance may be used by public employees in determining employment conditions. *Peters* v. *Board of Education of Reorganized School District No. 5,* 506 S.W. 2d 429, 433 (Mo. 1974). The Kansas courts have not directly faced this question, but have referred favorably to a similar holding. See *West Hartford Education Association, Inc.* v. *De Courcy,* 162 Conn. 566, 295 A.2d 526, 533 (1972) cited in *National Educational Association of Shawnee Mission* v. *Board of Education,* 212 Kan. 741, 512 P.2d 426, (1973).

We are aware of no instance where arbitration has been "read into" a statute governing the authority of public officials. Indeed, where as here, the authority of the officials is clearly set forth in a bi-state compact, such authority by implication seems particularly inappropriate.

APTA represents public transit systems in some forty states including many where delegation of public contracting rights could under existing case law be considered an unlawful delegation of statutory duties.

[34] *Id.,* This bi-state compact was approved by Congress on July 11, 1968, H.J. Res. IIII, 90th Cong., 1st Sess., Pub. L. 90-395, 82 Stat. 338 (1968).

The states where delegation to arbitrators (such as that sought by Respondent) would be improper, would include:

Missouri *(Anderson, supra);* Kansas *(Landau, supra);* Colorado *(Greeley Police Union* v. *City Council of Greeley,* 553 P.2d 790 (Colo. 1976)); Maryland *(Maryland Classified Employees Ass'n, Inc.* v. *Anderson,* 380 A.2d 1032 (Md., 1977)); Ohio *(Trotwood Madison Classroom Teachers Ass'n* v. *Trotwood Madison City School District Board of Education,* 52 Ohio App. 2d 39, 367 N.E.2d 1233 (1977); Utah (*Salt Lake City* v. *I.A. of Firefighters,* 563 P.2d 786 (Utah 1977)); California *(San Francisco Firefighters* v. *City and County of San Francisco,* 68 Cal. App. 3d 896, 137 Cal. Rptr. 607 (1977)).

Where there are no standards to guide the arbitrator, no procedural safeguards, and where arbitrators are not accountable, many other state courts have held that delegation of authority to set wages to an arbitrator is unlawful.

CONCLUSION

For the reasons set forth herein, APTA respectfully requests that this Court grant certiorari, reverse the judgments of the lower courts, and enter judgment in favor of the Petitioner.

Respectfully submitted,

W. Stell Huie
David E. Fox

Attorneys for Amicus Curiae
American Public Transit Association

1100-17th Street, N.W.
Washington, D.C. 20036

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